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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 915

MILO MOORE, DIRECTOR OF FISHERIES OF THE STATE OF WASHINGTON, AND DON W. CLARKE, DIRECTOR OF GAME OF THE STATE OF WASHINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 34–59) is reported in 62 F. Supp. 660. The opinion of the circuit court of appeals (R. 664–677) is reported in 157 F. (2d) 760.

JURISDICTION

The decree of the circuit court of appeals was entered on October 25, 1946 (R. 678). The petition for a writ of certiorari was filed on January 20, 1947. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the executive order of February 19, 1889, creating the Quillehute Indian Reservation, included therein the part of the Quillehute River which flows through the reservation and the tidal lands in the river and in the Pacific Ocean bordering the reservation.

2. Whether the court below erred in refusing to defer to this Court's denial of certiorari to review a prior holding of the court below that these lands were not within the reservation.

STATEMENT

The decree sought to be reviewed (R. 678) affirms a decree (R. 70–73) enjoining petitioners from exercising any jurisdiction over the fishing activities of the Quillehute Tribe of Indians[1] in the Quillehute River within the confines of the Quillehute Indian Reservation and in the tidal waters of the river and of the Pacific Ocean bordering upon the reservation. The material facts are as follows:

By Article I of a treaty concluded on July 1, 1855, ratified by the Senate on March 8, 1859, and proclaimed by the President the following

[1] The opinion below spells the name as "Quillayute" (see, e. g., R. 664, 665). Petitioners' spelling "Quileute" is also permissible.

April 11 (12 Stat. 971) the Quinaielt and Quillehute Indians ceded to the United States certain lands. Article II of the treaty provided (R. 62):

> There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a *tract or tracts of land sufficient for their wants* within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use * * *. [Italics added.]

On February 19, 1889, the President created the Quillehute Indian Reservation by an executive order. The order declared (R. 63):

> It is hereby ordered that the following-described tracts of land *situate in Washington Territory,* viz: Lots 3, 4, 5, and 6, Section 21; lots 10, 11, and 12, and the southwest quarter of the southwest quarter, Section 22; fractional section 27, and lots 1, 2, and 3, section 28; all in township 28 north, of range 15 west, be, and the same are hereby, withdrawn from sale and settlement and set apart for the permanent use and occupation of the Quillehute Indians * * *. [Italics added.]

On February 22, 1889, the President approved the Act enabling the Territory of Washington to become a State (25 Stat. 676).[2]

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[2] The State was admitted into the Union on November 11, 1889. 26 Stat. 1552.

The Quillehute River, a navigable stream, flows through the reservation. A part of the reservation is bounded by the Pacific Ocean. The executive order made no reference to either river or ocean. The uplands described in the order consist of 594 acres, upon which is located the ancient village which has always been the home of the Quillehute Indians. They are valuable only as a place where the Quillehutes may live and have free and easy access to the waters of the Quillehute River and the Pacific Ocean. Throughout the existence of the tribe, almost the sole means of livelihood of these Indians has been the aquatic life found in these waters (R. 64). Reservation of the uplands alone would not have met the requirements of Article II of the treaty. Without the inclusion of the waters in question, the tract of land described in the executive order was and is wholly insufficient for the wants of the Quillehute Indians (R. 64–65). Between 1854 and 1889, the Quillehutes numbered from 250 to 300; there are now between 175 and 200 of them (R. 151, 180, 207, 261).

On July 6, 1928, the United States brought an action in the United States court for the Western District of Washington to enjoin W. F. Taylor and others from maintaining certain barges in the Quillehute River off the Indian village upon the ground that the barges were located within the reservation in violation of law. The district court

held that the reservation included the bed of the river. 33 F. (2d) 608. The circuit court of appeals reversed. *Taylor* v. *United States,* 44 F. (2d) 531. It held that the executive order setting aside the reservation did not reserve the bed of the river for the Indians. The court said (pp. 534–535):

> These lands and waters had *already* vested in the state by virtue of * * * the transfer thereof to the state by the Enabling Act and its acceptance by the state in its Constitution, subject to the discretionary power of the President under the treaty to reserve the same under the treaty. * * * If we recognize the rule that in grants to Indians uncertainties are to be determined more favorably to them than to the government, we must here recognize that the governmental act is dual in its effect, if so construed, as it takes from the state a right *already* expressly granted to it and reserves it for a political body, not by express grant or reservation, but by mere implication. In other words, so construed, the act of the President extends to a political body, merely because it is a political body, a right which must be taken from another political body to which it has been *already* expressly granted. It would seem more reasonable that the *previous* express grant to a political body would take precedence over the implications which would otherwise arise from the reservation of the upland for an

> Indian tribe. We are inclined to think that the inferences to be derived from the fact that the Quileute Indians for whom the reservation was set apart are overcome by the *prior* express grant of the tidelands and navigable waters to the state. [Italics added.]

This Court denied a petition for certiorari. 283 U. S. 820.

Following this decision, the State of Washington for the first time required the Indians fishing in these waters to comply with all state game and fish laws (R. 542–543). On August 7, 1945, the Government brought this action to enjoin petitioners from such interference with the Indians (R. 1–22). After trial, the district court made findings of fact (R. 59–68) and conclusions of law (R. 68–70), rendered an opinion (R. 34–59), and entered decree granting the relief prayed for (R. 70–73).

The circuit court of appeals affirmed (R. 664–677). It held that the executive order reserved to the Indians the waters in question (R. 672). It declined to adhere to its prior decision in *Taylor* v. *United States,* 44 F. (2d) 531. As it said (R. 674–675:

> As to stare decisis, this court made a controlling error in political history. It based its opinion upon a statement that Washington entered the Union before the reservation was made * * * To such a decision, based upon such an error of fact

judicially to be noticed, the doctrine of stare decisis cannot apply.

ARGUMENT

Upon a careful review of the circumstances attending the making of the treaty and the issuance of the executive order (R. 667–671), the court below concluded that the waters in question were made a part of the Quillehute Indian Reservation and that consequently the fish and game laws of Washington could not apply in these waters (R. 672). Petitioners bring forward nothing to support their assertion (Pet. 4) that the court's construction of the executive order was erroneous.

The burden of petitioners' complaint (p. 7) is that the circuit court of appeals declined to follow its earlier decision in *Taylor* v. *United States,* 44 F. (2d) 531. But, as the court pointed out (R. 674–675) that decision was based on a mistake of fact and did not arise out of litigation between the parties here involved. However, petitioners argue that, because this Court denied the Government's petition for certiorari in the *Taylor* case, the erroneous decision is binding in the case at bar (Pet. 8). The argument is without merit. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver,* 260 U. S. 482, 490; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403–404. Ob-

viously, therefore, the court below was not constrained to perpetuate the error made in the *Taylor* case.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, he denied.

Respectfully submitted.

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